

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARRIE BOSLEY

Claimant

VS.

DILLONS

Self-Insured Respondent

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Docket No. 1,004,970

ORDER

Respondent, a qualified self-insured, requests review of the February 17, 2005 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 9, 2005.

APPEARANCES

Paul V. Dugan, Jr., of Wichita, Kansas, appeared for the claimant. Scott J. Mann, of Hutchison, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained an accidental injury arising out of and in the course of her employment with the respondent on May 1, 2002, that notice of that accident was established and further found, based upon the totality of the evidence, that claimant sustained a 5.5 percent permanent impairment to her left knee as a result of that accident. The ultimate impairment finding was based upon an average of the ratings offered by Drs. Estivo (5 percent) and Drazek (6 percent). The ALJ further granted claimant temporary total disability benefits from May 1, 2002 until July 10, 2002, when she was released by Dr. Estivo, the treating physician.

The respondent requests review of the ALJ's determination and in the Application for Review, listed the sole issue as the nature and extent of claimant's impairment. Unfortunately, respondent's counsel failed to file any sort of brief to the Board, nor any submission letter or brief to the ALJ, which would aid the Board in making its decision. To further complicate matters, at oral argument respondent's counsel suggested the real issue in dispute was not the nature and extent of claimant's impairment. Rather, respondent disputed whether claimant's injury arose out of and in the course of her employment with

respondent. Counsel based this argument upon the lack of any contemporaneous complaints on May 1, 2002, in any medical records relative to a work injury.

Claimant, who was courteous enough to file a brief in this matter, urges the Board to merely affirm the ALJ's Award. Claimant maintains that the May 1, 2002 office note of Dr. Martinez references claimant's work activities that day and her onset of knee complaints. Thus, claimant argues that she has met her evidentiary burden to establish that her injury arose out of and in the course of employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed in all respects.

The ALJ's recitation of the facts is factually accurate and is hereby adopted by the Board.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.³

Respondent contends there are no contemporaneous complaints of claimant's knee injury and its connection to her work on May 1, 2002. Yet, as pointed out by claimant's

¹ K.S.A. 44-501(a).

² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

³ *Id.*

counsel, in the May 1, 2002 office note, Dr. Martinez memorialized claimant's complaints of pain her in left knee commencing on April 30, 2002. He notes that "pt [patient] worked today. Pt [patient] does a lot of squatting and bending [with] knee at work."⁴ This note alone refutes the respondent's sole defense in this matter.

After considering respondent's arguments in this matter, the Board finds no justifiable reason to disturb the ALJ's findings in this matter. Accordingly, the ALJ's Award is affirmed in all respects.

In the future, respondent's counsel is cautioned that briefs are not merely recommended but are particularly helpful when, as here, he appeared to be confused about the true nature of the issue on appeal.⁵ All participants in the appeal process should be entitled to the opportunity and courtesy to carefully review and consider the matters to be argued.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 17, 2005, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul V. Dugan, Jr., Attorney for Claimant
Scott J. Mann, Attorney for Self-Insured Respondent
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ Martinez Depo., Ex. 2 at 2.

⁵ K.A.R. 51-18-4(a).